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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR-5275-P-11]
RIN 2577-AC80

**Native American Housing Assistance and Self-Determination Reauthorization Act of 2008:
Amendments to Program Regulations**

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make several revisions to the regulations governing the Indian Housing Block Grant (IHBG) Program and the Title VI Loan Guarantee Program. HUD negotiated the proposed rule with active tribal participation under the procedures of the Negotiated Rulemaking Act of 1990, pursuant to the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008. The proposed regulatory changes would implement statutory amendments and reflect the consensus decisions reached by HUD and the tribal representatives.

DATES: Comment Due Date: **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 4126, Washington, DC 20410; telephone number 202-401-7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) (NAHASDA) changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block grant program, known as the Indian Housing Block Grant (IHBG) Program. In addition, Title VI of NAHASDA authorizes federal guarantees for the financing of certain tribal activities (under the Title VI Loan Guarantee Program). The regulations governing the IHBG and Title VI Loan Guarantee programs are located in part 1000 of HUD's regulations in title 24 of the Code of Federal Regulations. In accordance with section 106 of NAHASDA, HUD developed the regulations with active tribal participation under the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).

The Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Public Law 110-411, approved October 14, 2008) (NAHASDA Reauthorization Act) reauthorizes NAHASDA through September 30, 2013, and makes a number of amendments to the statutory requirements governing the IHBG and Title VI Loan Guarantee programs. The NAHASDA Reauthorization Act amends section 106 of NAHASDA by providing that HUD

shall initiate a negotiated rulemaking in order to implement aspects of the 2008 Reauthorization Act that require rulemaking. On January 5, 2010, at 75 FR 423, HUD published a Federal Register notice announcing the final list of members of the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee (the NAHASDA Rulemaking Committee, or the Committee).

The NAHASDA Rulemaking Committee convened for one, 2-day meeting and five, 3-day meetings in Scottsdale, Arizona; Westminster, Colorado; Seattle, Washington; and St. Paul, Minnesota, from March to August 2010. Under the terms of the charter approved by the Committee, the negotiations were to focus on implementation of NAHASDA, as amended, except that subpart D of 24 CFR part 1000, which governs the NAHASDA allocation formula, was generally to be excluded from the negotiations. (The committee nonetheless agreed by consensus to make minor revisions to regulations in subpart D in order to address issues that primarily involved provisions under subpart C.) HUD also agreed to consider issues that did not directly arise from statutory amendments, if time permitted.

II. This Proposed Rule

This proposed rule would amend HUD's regulations by implementing statutory amendments to NAHASDA. The proposed rule would make changes to the regulations under subpart A of 24 CFR part 1000 regarding the guiding principles of NAHASDA, definitions, labor standards, environmental review procedures, procurement, tribal and Indian preference, and program income. Proposed changes to subpart B of 24 CFR part 1000 address eligible families, useful life of properties, and criminal conviction records. Proposed changes to subpart C of 24 CFR part 1000 would address the tribal program year, Indian Housing Plan (IHP) requirements, administrative and planning expenses, reserve accounts, local cooperation

agreements, and exemption from taxation. Proposed changes to subpart D of part 24 would address certain formula information that must be included in the IHP and Annual Performance Report (APR), as well as the date by which HUD must provide data used for the formula and projected allocation to a tribe or Tribally Designated Housing Entity (TDHE). Proposed changes to subpart E of 24 CFR part 1000 would address financing guarantees. Finally, proposed changes to subpart F of 24 CFR part 1000 would address HUD monitoring, APRs, APR review, HUD performance measures, recipient comments on HUD reports, remedial actions in the event of substantial noncompliance, audits, submission of audit reports, and records retention.

Following is a section-by-section description of provisions that HUD proposes under this rule:

Subpart A

§ 1000.2, Guiding principles

Section 1000.2 would be revised to conform it to the provision of amended NAHASDA section 2, that the federal government “shall” work to provide housing assistance and to assist development of private finance mechanisms, and that federal assistance “shall” be provided in a manner that recognizes Indian self-determination and self-governance. Prior to the NAHASDA Reauthorization Act, these provisions stated that the federal government and federal assistance “should” comply with the stated principles.

§ 1000.9, Negotiated rulemaking

Section 1000.9 would establish provisions that apply to the negotiated rulemaking process that is used under NAHASDA. Paragraph (a) would require HUD to appoint representatives of the federal government and representatives of diverse tribes and program recipients. Paragraph (b) would codify the requirement of NAHASDA section 106(b)(2)(C) for

HUD to initiate negotiated rulemaking within 90 days after enactment of any act reauthorizing NAHASDA, as well as any act that significantly amends NAHASDA. Paragraph (c) would provide that negotiated rulemaking committees may establish workgroups to develop proposals. Paragraph (d) would provide that the committee submits recommended rules to HUD and that once HUD determines what rules it will propose, it will publish notice of the proposal in the Federal Register. Finally, it would provide that the committee and HUD will review public comments before HUD makes a determination on the provisions of the final rule.

§ 1000.10, Definitions

Section 1000.10(b) would add a new definition of “housing related activities,” which is used in proposed § 1000.64 with respect to permissible use requirements for program income. The proposed definition would be modeled, in significant part, on the new statutory definition of “housing related community development.” Section 1000.10(b) would codify in regulations the new statutory definition of “housing related community development,” which are those activities that may be financed with notes and other obligations guaranteed by HUD pursuant to section 601 of NAHASDA. It would revise the existing definition of “Indian Area” to conform to the amended definition in NAHASDA. It would also add a new definition of “outcomes,” which is used in NAHASDA section 102(b) to describe information required to be in the IHP, and which would be used in § 1000.512 to describe items required to be included in IHPs and performance reports. Section 1000.10(b) would also add a new definition of “tribal program year,” which is used in §§ 1000.110, 1000.201, 1000.214, and 1000.216 to specify the basis on which grants are provided and the date by which IHPs must be submitted to HUD. The definition would provide that “tribal program year” means the fiscal year of the recipient.

§ 1000.12, Nondiscrimination requirements

Section 1000.12(d) would be revised to conform to amended NAHASDA section 201(b)(6), which exempts federally recognized tribes and their TDHEs from Title VI of the Civil Rights Act of 1964 and the Fair Housing Act in carrying out activities under NAHASDA. It would also provide that state-recognized tribes may provide preference to tribal members and other Indian families pursuant to NAHASDA section 201(b), and in employment and contracting pursuant to NAHASDA section 101(k).

§ 1000.16, Labor standards

Section 1000.16 would be revised to add a paragraph (e) based on NAHASDA section 104(b)(3), which addresses the applicability of tribal laws that require payment of not less than prevailing wages to certain workers. The statute provides that if a contract or agreement for assistance, sale, or lease pursuant to NAHASDA is covered by such a tribal law or laws, then the contract or agreement is not required to contain a provision requiring payment of prevailing wages in accordance with section 104(b)(1). The current paragraph (e) of 1000.16 would be redesignated as paragraph (f). In addition, the citation to the Davis-Bacon Act in paragraph (a) would be revised to reflect current codification of the provision referenced in amended section 104(b)(1) of NAHASDA, and the citation to the Contract Work Hours and Safety Standards Act in paragraph (c) would be updated to reflect the current codification of the referenced provision.

The Committee draft included a provision that addressed construction and development contracts that are entered into by a recipient. The language sought to clarify that such construction and development contracts, if entered into pursuant to a HUD contract or agreement for assistance, sale, or lease under NAHASDA, are not required to contain the prevailing wage provision referenced in NAHASDA section 104(b)(1) if the contracts are subject to tribal laws

that require payment of not less than prevailing wages. Upon further review, HUD determined that revision of the draft rule provision was needed in order to reconcile the intent of the Committee with language as used in the statute, but the Committee did not take up the draft provision again. Although this proposed rule does not include the described provision, HUD agrees that such construction and development contracts are not required to include the provision referenced in NAHASDA section 104(b)(1) under the described circumstances. HUD notes that in addition to construction and development contracts, contracts for the operation (including maintenance) of NAHASDA-assisted affordable housing are not required to include the provision under the described circumstances, and work performed directly by tribal or TDHE employees on NAHASDA-assisted housing is also not subject to the provisions in section 104(b)(1) in those circumstances. HUD specifically solicits public comment on whether inclusion of a provision clarifying these exclusions would be necessary or beneficial in the final rule.

§ 1000.21, Waiver of environmental review procedures

A new § 1000.21 would be added to conform to NAHASDA section 105(d), which establishes the circumstances under which HUD may waive certain procedural requirements for the submission of certifications related to environmental reviews performed by tribes. Following the amendment enacting section 105(d) of NAHASDA, HUD established, through the issuance of program Notice CPD-04-08, procedures¹ for requesting a waiver of the statutory

¹ The following is a brief summary of these procedures. When a procedural or nonsubstantive violation of NEPA by a tribe has been identified, the grantee has the opportunity to request a waiver. The waiver request must be in writing and include all available and relevant information necessary for HUD to complete an environmental review under 24 CFR part 50. HUD conducts a site visit and prepares and signs the environmental assessment. The waiver request, executed environmental assessment, and all supporting documentation are provided to the Headquarters Office of Native American Programs (ONAP) for review. If the waiver request is acceptable, the Deputy Assistant Secretary for Native American Programs forwards it to the Environmental Review Division of the Office of Community Planning and Development (CPD). CPD has NEPA oversight authority for HUD. After appropriate review and consideration, if the waiver package is found to comply with section 105(d) of NAHASDA, it is then

environmental review requirements. It is HUD's policy to follow the procedures in Notice CPD-04-08 when processing environmental review waivers.

§ 1000.26, Procurement

Section 1000.26 would incorporate two statutory provisions related to procurement. The exemption in NAHASDA section 203(g) of procurements of less than \$5,000 from competitive requirements would be incorporated in § 1000.26(a)(11)(iii), and the provision in section 101(j) that recipients may use federal supply sources made available by the General Services Administration would be incorporated in § 1000.26(a)(11)(iv). The existing regulatory provision with respect to bonding requirements in procurement would be redesignated as § 1000.26(a)(11)(ii).

§ 1000.42, Section 3 of the Housing and Urban Development Act of 1968

Section 1000.42 would address section 3 of the Housing and Urban Development Act of 1968, which requires certain HUD recipients (e.g., recipients of more than \$200,000 in HUD housing and community development assistance for a covered project) to provide economic opportunities to low- and very low-income residents. New paragraph (c) would clarify that recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their tribe in accordance with section 101(k) of NAHASDA. Paragraph (d) would provide that for purposes of section 3, NAHASDA funding is subject to the requirements applicable to the category of programs entitled "Other Programs" that provide housing and community development assistance. The proposed provision would serve to clarify that NAHASDA recipients do not fall under the alternative category of recipients under section 3, which is for public and Indian housing agencies that award contracts in connection with

approved by the Assistant Secretary for Public and Indian Housing and the Assistant Secretary for CPD, and the grantee is notified that the waiver is approved.

assistance for development, modernization of units, and the operation of programs and projects under the 1937 Act. NAHASDA recipients do not receive assistance under the 1937 Act.

§§ 1000.48, 1000.50, and 1000.52, Tribal and Indian preference

Sections 1000.48, 1000.50, and 1000.52 would be revised to implement section 101(k) of NAHASDA, which provides that the employment and contract preference laws of a tribe that receives the benefit of a grant (or portion of a grant) apply to the administration of the grant (or portion of a grant), notwithstanding any other provision of law.

Sections 1000.48, 1000.50, and 1000.52 would clarify that a recipient is required to apply tribal preference in employment and contracting, if a tribe has enacted tribal preference laws, and that only to the extent that such tribal preference laws have not been enacted, a recipient must instead apply Indian preference, as required under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

In addition, §§ 1000.48(c) and 1000.52(d) would clarify that the exemption in NAHASDA section 203(g) for procurements of less than \$5,000 from competitive rules and procedures serves to exempt such procurements from Indian preference requirements under section 7(b) of the Indian Self-Determination and Education Assistance Act.

§§ 1000.26, 1000.62 and 1000.64, Program income

The NAHASDA Reauthorization Act amended NAHASDA section 104(a)(1)(B) to change one of the conditions for a recipient to be able to retain program income. The amendment removed the requirement for a recipient to agree to use the program income for “affordable housing activities” in accordance with NAHASDA, and replaced it with a requirement for the recipient to agree to use the program income for “housing related activities” in accordance with NAHASDA. Accordingly, a new § 1000.64 would address the permissible

uses of program income and clarify that the requirement for program income to be used for “housing related activities” is the only applicable federal requirement. (As discussed above, “housing related activities” would be defined in § 1000.10(b).) This clarification is consistent with HUD’s treatment of proceeds of sale as outlined in the notice titled “IHBG Program: Notice of Revision to Transition Requirements – Proceeds of Sales of Former 1937 Act Homeownership Units,” published in the Federal Register on April 1, 1999 (64 FR 15778). In addition, the provision in § 1000.62(b) that reflects the former statutory provision regarding “affordable housing activities” would be removed, so that § 1000.62 would address only what constitutes program income, rather than its permissible uses. The heading of § 1000.62 would be revised accordingly. Finally, consistent with the amendments to NAHASDA section 104(a)(2) regarding expenditure of program income, § 1000.26(a)(5) would be revised to provide that a recipient may draw down or expend IHBG funds before expending program income.

§ 1000.58, Investment of IHBG funds

Paragraph (f) of § 1000.58 would be revised to remove the current restriction on investing IHBG funds that have been allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the IHBG formula. Paragraph (g) would be revised to increase the permissible period of investments from 2 to 5 years. These changes would provide recipients greater flexibility in their financial management of IHBG funds pending their expenditure on IHBG activities.

Subpart B

§§ 1000.104, 1000.106, 1000.108, 1000.110, 114, 116, and 118, Eligible families

The NAHASDA Reauthorization Act amended NAHASDA section 201(b)(3), which provides that, notwithstanding the general requirement for assistance to be provided to low-

income Indian families, recipients may provide housing to other families whose presence is essential to the well-being of Indian families. The amendment removed the provision that the exception is for “non-Indian” essential families. Accordingly, corresponding regulatory references to “non-Indian” essential families would be removed throughout §§ 1000.104, 1000.106, 1000.108, 1000.110, 1000.114, 1000.116, and 1000.118.

Section 1000.110(a) would clarify that a family that is low income at the times specified in redesignated § 1000.147, but which subsequently becomes non low-income due to an increase in income, may continue to participate in the program in accordance with the recipient’s admission and occupancy policies. The provision would clarify that NAHASDA does not prohibit the recipient from continuing to serve such families, but that the policy determination is to be made by the recipient. Amounts of assistance expended on such families would not be counted toward the 10 percent limit (or a higher limit approved by HUD) under § 1000.110(c). Such families, as well as a family member or household member who takes ownership of a homeownership unit under § 1000.146, would not be subject to the requirements of redesignated §1000.110(b), but would be subject to the limitations on benefits that non low-income families may receive under § 1000.110(d) only to the extent provided in the recipient’s admission and occupancy policies.

Section 1000.110(b), which enumerates three activities that may serve non low-income families, would be removed to conform to the amendment that removed these enumerated activities in NAHASDA section 201(b)(2). The NAHASDA amendment added a blanket provision that any affordable housing activities may be provided to non low-income families to the extent that HUD approves the activities due to a need that cannot be reasonably met without the assistance. Prior to the statutory amendment, non low-income families could receive only

homeownership assistance under section 202(2), model activities under section 202(6), or loan assistance activities under Title VI of NAHASDA.

In addition, redesignated § 1000.110(c) would be revised to provide that a recipient may, without HUD approval, use up to 10 percent of the amount it plans to spend in a tribal program year, rather than 10 percent of the amount of its annual grant, for families whose income falls within 80 to 100 percent of median income. (Use of amounts in excess of 10 percent would still require HUD approval.) This change would be consistent with HUD's practice of no longer requiring recipients to track expenditures against particular annual grants. Instead, activities and expenditures would be tracked to the grantee's fiscal year on a rolling year-to-year basis.

Redesignated § 1000.110(e) would clarify that amounts of assistance expended on essential families would not be counted toward the 10 percent limit (or a higher limit approved by HUD) under § 1000.110(c). It would retain the existing provision that essential families are not subject to the limitations on benefits that non low-income families may receive under § 1000.110(d).

Finally, § 1000.104(d) would incorporate the provision in NAHASDA section 201(b) that housing assistance may be provided to a law enforcement officer whose presence the recipient determines will deter crime.

§§ 1000.141, 1000.142, 1000.143, 1000.144, 1000.145, and 1000.146, Useful life

Proposed § 1000.146 would incorporate the provision of NAHASDA section 205(c), which provides that a family or household member who subsequently takes ownership of a homeownership unit is not subject to the binding commitment requiring that a dwelling unit must remain affordable for the useful life of the property. Proposed § 1000.146 would clarify,

however, that if such a family or household member then transfers the property to a third party, such a third party is subject to the requirement that the unit remain affordable for its useful life.

Section 1000.141 would codify the definition of “useful life.” The question in the heading of § 1000.142 was revised slightly to clarify “how a recipient determines useful life” rather than “what is the useful life.” The response was also revised slightly to respond to the revised question. Proposed §§ 1000.143 and 1000.144 would clarify that a recipient implements the useful life requirement by placing a binding commitment that is satisfactory to HUD on the assisted property, and that to be satisfactory to HUD, the binding commitment must be a written use restriction agreement that is placed on the property and that has a duration equal to the property’s useful life. Existing §§ 1000.144 and 1000.146 would be redesignated as §§ 1000.145 and 1000.147 for organizational clarity.

Redesignated § 1000.147 (formerly § 1000.146) would be revised to codify the provision in section 205(a) of NAHASDA that states when a family must be low-income to participate in a housing program under NAHASDA.

§§ 1000.150 and 1000.152, Criminal conviction records

The heading of § 1000.150 would be revised to conform to the NAHASDA Reauthorization Act amendment to NAHASDA section 208(a) that permits tribes and TDHEs to access criminal conviction records of applicants for employment.

Section 1000.152 would be revised to specify how criminal conviction records may be used with respect to applicants for employment, by referencing permitted purposes under section 208 of NAHASDA.

Subpart C

§ 1000.201, Tribal program year

Section 1000.201 would be revised to conform to the amended provision of NAHASDA section 102(a) that IHPs are submitted for a tribal program year, rather than for the federal government's fiscal year.

§§ 1000.214, 1000.216, 1000.220, and 1000.230, Indian Housing Plan and Annual Performance Report requirements

Sections 1000.214 and 1000.216 would be revised to conform to the amended provision of NAHASDA section 102(a) that an IHP must be submitted to HUD 75 days before the beginning of a tribal program year. The existing regulatory provision requires submission of the IHP by July 1. Section 1000.220 would be revised by removing the statement that IHP requirements are contained in section 102(c) of NAHASDA. The referenced statutory provisions were removed under the NAHASDA Reauthorization Act. Section 1000.220 would be further revised to state that it enumerates the “requirements,” rather than the “minimum requirements,” for items to be included in the IHP. It would add § 1000.302 to the list of cross-referenced regulatory sections that include items required to be in the IHP, as further discussed below. It would also remove § 1000.504 from the list, in accordance with the proposed removal of that section. Section 1000.230 would clarify that an IHP may use either the HUD estimated grant amount or the grant amount from the most recent compliant IHP.

§§ 1000.224, 1000.225, and 1000.227, Waivers of Indian Housing Plan requirements

Section 1000.224 would be revised in accordance with the amendment to section 101(b)(2) of NAHASDA. The revision would clarify that a waiver of IHP submission requirements is available when noncompliance is due to exigent circumstances beyond the control of the Indian tribe. It would also provide that HUD may not withhold the requested waiver unreasonably. Section 1000.225 would provide that a request for a waiver must be

submitted not more than 90 days beyond the submission due date. Section 1000.227 would require HUD to decide upon the waiver request and notify the recipient of its decision within 45 days of receiving the request.

§§ 1000.236 and 1000.238, Administrative and planning expenses

Section 1000.236(a) would be revised to provide that eligible administrative and planning expenses include expenses associated with the expenditure of non-IHBG funds on affordable housing activities, to the extent that the source of the non-IHBG funds limits expenditure of its funds on such expenses. The provision is intended to encourage recipients to leverage IHBG funds with funds obtained from other sources and recognizes that some sources permit little or none of their funds to be expended on administrative and planning activities. Section 1000.236(b) would be revised to conform to amended NAHASDA section 101(h)'s provision that eligible uses include comprehensive housing and community development planning activities. Section 1000.238 would be revised to provide a two-tiered limit on the amount of IHBG funds that may be used on administrative and planning expenses. (The existing regulation imposes a limit equal to 20 percent of the annual grant amount.) Under the revision, recipients receiving in excess of \$500,000 would be permitted to use up to 20 percent of either their annual expenditures of grant funds or of their annual grant amount, whichever is greater, on such expenses. Recipients receiving \$500,000 or less would be permitted to use up to 30 percent of either their annual expenditures or of their annual grant amount, whichever is greater, on such expenses. A recipient that is receiving grant funds on behalf of one or more grant beneficiaries would apply these rules to the amounts provided for the benefit of those grant beneficiaries, to determine the amount it may use for administrative and planning expenses. It would also provide that a recipient combining grant funds with other funding may request HUD approval to

use a higher percentage and may justify the request based on its total expenditure of funds from all sources for that year.

§ 1000.239, Reserve accounts

New § 1000.239 would incorporate the provisions of NAHASDA section 202(9), which adds to the list of eligible activities the establishment of a reserve account for the purpose of accumulating funds for administrative and planning activities related to affordable housing activities. The proposed regulation would clarify that the amounts may be invested in accordance with existing regulatory provisions in § 1000.58(c), and would provide that a recipient may have more than one such account, provided that the total amount of reserves in all accounts does not exceed the maximum amount established in NAHASDA. The proposed regulation would also incorporate NAHASDA's formula for calculating the maximum amount. Finally, it would clarify that interest earned on reserves is not program income and is not included in calculating the maximum amount of reserves.

§§ 1000.244 and 1000.246, Local cooperation agreements and exemption from taxation

Two new sections would implement NAHASDA sections 101(c) and (d). Section 1000.244 would provide the procedure for requesting a waiver of the requirements for a local cooperation agreement and tax-exempt status of dwelling units. Requests would have to be submitted to the Area ONAP and would be required to demonstrate that the recipient had made a good-faith effort to comply. Section 1000.246 would require HUD to make a determination on and respond to a request for a waiver within 30 days of receipt, or to provide a reason for any delay and a timeline within which a determination would be made. It would also require HUD to notify the recipient as to whether the waiver is granted or denied. A granted waiver would remain effective until revoked. If a waiver request is denied, IHBG funds would not be

permitted to be spent on housing units, and any amounts expended prior to the denial would have to be reimbursed.

Subpart D

§ 1000.302, IHBG formula definitions

Paragraph (2)(i)(B) of the definition of “Formula area” in § 1000.302 would be revised to provide that the forms on which a tribe reports on substantial housing services are the IHP and APR. In the same section, the definition of “Substantial housing services” would provide that the required written verification that a tribe must provide annually is to be included in the IHP and APR.

§ 1000.328, Certification of households at or below 80 percent of median income

Section 1000.328 would be revised to provide that for a tribe receiving minimum funding, it must certify in its IHP, rather than demonstrate, the presence of households at or below 80 percent of median family income.

§ 1000.332, Schedule for HUD to provide formula data and projected allocations

Section 1000.332 would revise the date by which HUD is required to provide a tribe or TDHE with the data used to determine its formula allocation. The existing regulation requires provision of the data by August 1, and under this proposed rule would be revised to June 1. The change is necessary in order to ensure timely provision of the information to a tribe or TDHE with a program year that begins on October 1.

Subpart E

§§ 1000.408 and 1000.410, Financing guarantees

Section 1000.408, which sets forth the manner in which a tribe or TDHE was required to show that it had made efforts to obtain financing, prior to requesting financing guarantees from

HUD, would be removed. The removal conforms to the NAHASDA Reauthorization Act's removal of this requirement, which was previously found in section 601(b) of NAHASDA, as a condition for obtaining guarantees from HUD. A new paragraph (e) would be added to § 1000.410 to conform to NAHASDA section 602(d), which requires guarantees made under Title VI to guarantee repayment of 95 percent of the unpaid principal and interest due on guaranteed obligations.

§§ 1000.424 and 1000.428, Financing guarantees for housing related community development

Section 1000.424 would be revised to provide that an application for financing guarantees under Title VI of NAHASDA may identify housing-related community development activities, as well as affordable housing activities for which the guarantees are sought. Section 1000.428 would be revised to provide that an application may be disapproved if proposed activities are not within the definitions of these eligible activities. The proposed changes conform to the amended NAHASDA section 601(a)'s provision that housing-related community development is a permissible use for the proceeds of financing guaranteed by HUD under Title VI of NAHASDA.

Subpart F

§ 1000.503, HUD monitoring

New § 1000.503 would clarify the appropriate frequency and level of monitoring of recipients. Paragraph (a) would codify the standard risk assessment factors that HUD uses to determine the frequency and priority for monitoring a particular recipient, and would provide that HUD may establish other factors, consistent with HUD's Tribal Consultation Policy. In accordance with the policy, HUD would provide written notification and an opportunity for comment when establishing such other factors. The provisions would not apply to monitoring or

compliance reviews concerning regulatory requirements that arise independently of NAHASDA, such as those concerning nondiscrimination and accessibility for persons with disabilities. Any new factors would be issued by program guidance.

Paragraph (b) would provide the level of monitoring that HUD would apply once a recipient has been selected for monitoring. Monitoring would typically cover the current and prior 2 tribal program years, and it would include inspection of no more than the greater of 10 dwelling units or 10 percent of all dwelling units, and review of no more than the greater of 10 client files or 10 percent of client files. HUD would undertake additional sampling and review if this initial sampling indicated noncompliance. Paragraph (c) would provide that, subject to the limitation on time that recipients are required to retain records under § 1000.552, HUD would be permitted to undertake additional sampling and review, notwithstanding these sampling limits, whenever HUD has credible information suggesting noncompliance. HUD would share the information with the recipient, as appropriate. Finally, paragraph (e) would provide that a recipient may request to enter into a self-monitoring agreement with HUD, under which HUD would monitor only the recipient in accordance with the agreement, absent reasonable evidence of fraud, a pattern of noncompliance, or significant unlawful expenditure of IHBG funds.

§ 1000.512, Annual Performance Reports

Paragraphs (b)(1) and (b)(2) of § 1000.512 would be revised by replacing the term “objectives” with “planned activities,” consistent with the amendment to section 102(b)(2) of NAHASDA. Section 1000.512 would also be revised to list additional items required to be included in APRs. Paragraph (d) would require inclusion of annual performance data, including jobs supported with IHBG funds, and outputs and outcomes by eligible activity. Paragraph (e)

would cross-reference items that may be required to be included in the APR under §§ 1000.302 and 1000.544, as further discussed in this preamble.

§ 1000.520, Annual Performance Report review

Section 1000.520 would be revised to clarify that HUD's review of an APR takes place upon submission and that there is only one such review.

§§ 1000.504 and 1000.524, HUD's performance measures

Section 1000.524 would be revised by removing the requirement that 90 percent of grant funds must be obligated within 2 years of the grant award. The revision would conform to NAHASDA section 203(f)(1)'s provision that HUD may not require commitment of funds earlier than provided for in the IHP. In addition, section 1000.524(e) would be revised to remove reference to a 5-year plan and its contents, which were eliminated from NAHASDA section 102 by the NAHASDA Reauthorization Act. Section 1000.504, which describes performance objectives, would also be removed, because of the elimination of the 5-year plan and because performance objectives are no longer required to be included in the one-year plan.

§ 1000.528, Recipient comments on HUD reports

Section 1000.528 would be revised to increase from 30 days to 60 days the time from HUD's completion of its review that HUD will have to issue its draft report. The section would also be revised to increase from 30 days to 60 days the time that a recipient and Indian tribe will have to review the draft report from HUD. It would also provide for an additional 30-day review period, available upon notification to HUD, as well as the possibility of additional extensions as mutually agreed to by HUD and the recipient.

§§ 1000.532 and 1000.538, Remedial actions in the event of substantial noncompliance

Section 1000.538, which addresses remedies that are available to HUD in the event of substantial noncompliance, would be removed, and provisions addressing remedies for substantial noncompliance would be provided in a revised and expanded § 1000.532. The existing provision at § 1000.532(c), which addresses a recipient's significant noncompliance with a major activity of its IHP, would be removed. A new paragraph (a) would include a broad provision addressing remedies HUD may take if HUD finds, after reasonable notice and opportunity to be heard, that a recipient has failed to comply substantially with any provision of NAHASDA or the implementing regulations in 24 CFR part 1000. The provision would cover significant noncompliance with a major activity of a recipient's IHP, which is specifically addressed in the existing provision at § 1000.532(c), and corresponds to the existing provision at § 1000.538(a).

Paragraph (b) of § 1000.532 would provide the procedures that HUD would follow for providing notice and the opportunity to be heard, prior to taking any action under paragraph (a). The procedures would include notification in writing of the action it intends to take and the opportunity for an informal meeting with HUD to resolve the deficiency. Prior to taking any remedial action under paragraph (a), HUD would provide the opportunity no less than 30 days prior to taking the action, in accordance with the procedures at 24 CFR part 26. Amounts would not be reallocated until 15 days after the hearing has been conducted and HUD has rendered a final decision.

Paragraph (c) of § 1000.532 would incorporate NAHASDA section 401(a)(4)'s expedited procedures for HUD's limitation of the availability of funds, when HUD determines that the substantial noncompliance of a recipient is resulting, and would continue to result, in a continuing expenditure of funds that is not authorized by law. The procedures would allow HUD

to limit the availability of such funds, provided that it gives notice of the action and then provides a hearing within 60 days.

Paragraph (d) of § 1000.532 would correspond to the provision in existing § 1000.538(c), which provides that HUD may provide technical assistance to a recipient if HUD determines that the failure to comply substantially is not willful and is a result of limited capacity or capability. The provision in paragraph (d) would clarify that HUD shall provide the technical assistance if, upon HUD's determination, the recipient requests the technical assistance. It would also incorporate NAHASDA section 401(b)'s requirement that a recipient must enter into a performance agreement with HUD as a condition of receiving the technical assistance.

Paragraph (e) of § 1000.532 would include the substance of the provision in paragraph (d) of existing § 1000.538, which provides that HUD may refer matters involving substantial noncompliance to the Attorney General, with a recommendation for taking civil action.

Finally, cross-references to remove § 1000.538 found in § 1000.60, § 1000.530, and § 1000.536 would be revised to refer to § 1000.532.

§ 1000.534, Substantial noncompliance

The reference to "goals and objectives" in § 1000.534(a) would be changed to "planned activities" in a recipient's IHP. The change would conform to the amendment to NAHASDA section 102(b)(2), which describes information required to be included in the IHP.

§ 1000.544, Audits

Technical changes would be made to § 1000.544 by adding statutory citations for NAHASDA and the Single Audit Act, and by removing the dollar amount that is the threshold for the annual audit requirement. In place of the dollar amount, § 1000.544 would reference the section of OMB Circular A-133 that establishes the threshold, which may change from time to

time. If applicable, a certification that the recipient has not expended federal funds in excess of the audit threshold that is set by OMB would be required to be included in the recipient's APR.

§ 1000.548, Submission of audit reports

Section 1000.548 would be revised to require the recipient to submit a copy of its audit report to the appropriate HUD ONAP Area Office at the time the recipient submits the audit report to the Federal Audit Clearinghouse.

§ 1000.552, Records retention

Section 1000.552(b) would be revised to provide that records must be retained for 3 years from the end of the tribal program year in which funds are expended. The provision would be consistent with HUD's practice of no longer requiring recipients to track expenditures against particular annual grants.

III. Other Statutory Amendments Addressed

The NAHASDA Reauthorization Act added two demonstration programs. Subtitle B of Title II of NAHASDA provides for Self Determined Housing Activities for Tribal Communities and section 606 created the demonstration program for guaranteed loans to finance tribal community and economic development activities. The Committee agreed that HUD would implement both programs by PIH notice. The full Committee both reviewed and commented on the draft PIH notices before they were published.

IV. Nonconsensus Items

The following section of the preamble summarizes issues that the Committee discussed but on which it did not reach consensus. Summaries of positions taken on nonconsensus items were drafted by the proponents of the positions.

Hearing Requirements for FCAS Overcounts

The NAHASDA Reauthorization Act added a new section 401(a)(2) to provide that “[t]he failure of a recipient to comply with section 302(b)(1)(regarding the counting of FCAS units) ... shall not, in itself, be considered to be substantial noncompliance for the purposes of this title.” HUD and tribal Committee members disagreed on the meaning of this paragraph. HUD construes this paragraph to mean that FCAS overcounts do not constitute substantial noncompliance under section 401(a)(1) of NAHASDA so as to require HUD to afford recipients an opportunity for a hearing prior to adjusting grant amounts. The tribal Committee members construed this paragraph as, at least, requiring such a hearing where the amount in controversy was of sufficient magnitude. A proposal to define this paragraph in the manner proposed by the tribal Committee members failed to achieve consensus, the two HUD committee members being the dissenting votes. As a result, the Committee did not propose any rule interpreting section 401(a)(2) of NAHASDA.

Recapturing Expenditures on Affordable Housing Activities

In 2000, Congress, in Public Law 106-568, removed a portion of then-section 405(c) of NAHASDA that had provided that “grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.” However, a regulation containing that same restriction remains at 24 CFR 1000.532(a). Since enactment of this 2000 statutory change, HUD’s position has been that this statutory change removed the statutory basis for the corollary regulation, and required the regulation’s repeal. The tribal Committee members believed that HUD still has discretion under NAHASDA to retain the regulatory restriction, despite the removal from the statute of language requiring this restriction. The Committee was unable to achieve consensus on the inclusion of the disputed regulatory language in the new, consolidated § 1000.532, the two HUD Committee

members being opposed to its inclusion. As a result, the subject provision is not included in the revision of § 1000.532 in this proposed rule.

Time Limitations on Noncompliance Claims

The majority of the workgroup that examined limitations on noncompliance claims had proposed that administrative enforcement actions be barred if not commenced within 3 years of the alleged noncompliance, and recommended that this limitation be placed in the new, consolidated § 532 of the regulations. HUD and some other Committee members did not support the adoption of a “statute of limitations” on enforcement actions. HUD’s position was that the Committee had already adopted a regulation limiting the scope and frequency of monitoring, including a records retention schedule that essentially functions as a limitation similar to a statute of limitations. The proposal to add a statute of limitations to the new, consolidated § 532 did not achieve consensus.

Line of Credit Control System (LOCCS) edits

The tribes proposed language for a new § 1000.532(a) that did not have the consensus from HUD participants in the workgroup, because the language had been drafted specifically to prohibit HUD from continuing to use the process known as a “LOCCS [Line of Credit Control System] edit,” through which HUD can put a hold on a tribe’s/TDHE’s ability to continue to draw down their IHBG funds through LOCCS unless and until the tribe/TDHE submits certain required documentation. The tribes and HUD disagree as to whether a “LOCCS edit” is a “limitation on the availability of payments to programs, projects, or activities not affected by a failure to comply,” as described under section 401(a)(1) of NAHASDA, which requires that HUD must provide notice and opportunity for a hearing before terminating, reducing, or limiting the availability of payments. HUD’s interpretation, provided in a memorandum from HUD’s

Office of General Counsel (OGC), is that the LOCCS edit does not conflict with the statutory language because the funds remain “available,” and can be accessed by the tribe/TDHE as soon as they submit the documentation required by HUD. Further, while a LOCCS edit will remain in place if the basis for the edit is “documented concerns on the part of ONAP regarding the use of grant funds,” a recipient will be able to continue to draw down grant funds despite the edit even though the concerns remain unresolved, subject to the submission of appropriate supporting documentation. The memo also described the LOCCS edit as a permissible form of “pre-drawdown monitoring,” through which HUD can determine – ahead of drawdown – whether a tribe/TDHE is going to use the funds for a permissible purpose and according to legal requirements. HUD described the LOCCS edit not as a limitation on availability of payments, but as a change in the method of payment requiring certain documentation before payments are released. HUD reviewed the relevant case law on other HUD programs with similar governing statutory language and found that all cases were clearly distinguishable because they involved HUD action that amounted to either outright termination of grants, or refusal to enter into grant agreements to obligate funds.

The tribes responded that the HUD memorandum did not provide a legal basis for the practice of a LOCCS edit, for the following reasons: (1) the LOCCS edit process set out in the HUD memo (and in PIH Notice 2009-49) is a limit on the availability of payments because it is a means by which HUD can and does impose certain specific conditions prior to the release of funds, which meets the dictionary definition of the statutory language; (2) even if the IHBG funds were to remain “available” (per HUD’s reasoning), the LOCCS edit places an impermissible “limit” on that availability; (3) HUD’s “pre-drawdown monitoring” justification is invalid because the monitoring process ends with the notice and hearing opportunity for

substantial noncompliance, and a “pre-drawdown monitoring” that limits access to funding would circumvent the entirety of the monitoring process; (4) the cases cited by HUD OGC in the memo undermined HUD’s position because those cases indicated the courts’ rejection of prior, similar efforts by HUD to avoid the kind of due process requirements set out in NAHASDA 401(a)(1) (in similar provisions of other HUD statutes) through “hyper-technical” reasoning and on the impermissible assertion of the need for agency “flexibility.”

The tribes then put forward the language that they had proposed previously for a new § 1000.532(a) that would in effect prohibit HUD from using the LOCCS edit. The HUD representatives on the committee did not agree to the proposal.

Content of Annual Performance Reports

HUD held eight tribal consultation meetings throughout the country from January through May 2005 to solicit comments and recommendations on the existing IHP and APR. A tribal workgroup consisting of 12 tribal representatives selected by the Regional Housing Associations worked with HUD staff to incorporate the suggestions gathered at the tribal consultations into a revised form. The recommendations from the tribal workgroup formed the basis for the majority of statutory revisions to the IHP and APR. In addition, the tribal workgroup agreed to include more detailed data collection in the APR in order to better document the positive effects of the IHBG program. Proposals were developed to regulate the data collection in the APR to more fully prescribe the content required under NAHASDA section 404(b), consistent with the recommendations of the tribal workgroup. The two HUD Committee members advocated for the full data collection recommended by the tribal workgroup; however, some tribal Committee members disagreed with most of the data collection items as being too burdensome. As a result, the Committee reached consensus only on the collection of jobs data,

units completed or assisted, families assisted, and outcomes by eligible activity under new § 1000.512(d). The Committee did not reach consensus on collecting housing unit cost information, a finite list of specific outcomes by eligible activity, or reduction in criminal activity data.

Indian Housing Plan and Annual Performance Report formats

Tribal representatives supported proposed revisions to permit HUD to accept alternative IHP and APR formats developed by each tribe, as a means to enhance the congressional finding and guiding principle of NAHASDA implementation of providing assistance in a manner similar to that accorded in Public Law 93-638. HUD committee members objected.

V. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review.

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review. This rule was determined to be a "significant regulatory action," as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by

OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB Control Number 2577-0218. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis for any rule that is subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The requirements of this proposed rule apply to Indian tribal governments and their tribal housing authorities. Tribal governments and their tribal housing authorities are not covered by the definition of “small entities” under the RFA. Accordingly, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD’s view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD’s objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose

substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule will not impose any federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Number (CFDA) for Indian Housing Block Grants is 14.867, and the CFDA for Title VI Federal Guarantees for Financing Tribal Housing Activities is 14.869.

List of Subjects

24 CFR Part 1000

Aged, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR 1000 as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

1. The authority citation for 24 CFR part 1000 continues to read as follows:

AUTHORITY: 25 U.S.C. 4101 et seq.; 42 U.S.C. 3535(d).

2. Revise § 1000.2(a)(6) and (a)(7) to read as follows:

§ 1000.2 What are the guiding principles in the implementation of NAHASDA?

(a) * * *

(6) The need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the federal government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for Indian tribes and their members.

(7) Federal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such

assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93–638 (25 U.S.C. 450 et seq.).

* * * * *

3. Add § 1000.9, to read as follows:

§ 1000.9 How is negotiated rulemaking conducted when promulgating NAHASDA regulations?

The negotiated rulemaking procedures and requirements set out in section 106(b) of NAHASDA shall be conducted as follows:

(a) Committee membership. In forming a negotiated rulemaking committee, HUD shall appoint as committee members representatives of the federal government and representatives of diverse tribes and program recipients.

(b) Initiation of rulemaking. HUD shall initiate a negotiated rulemaking not later than 90 days after the enactment of any act to reauthorize or significantly amend NAHASDA.

(c) Work groups. Negotiated rulemaking committees may form workgroups made up of committee members and other interested parties to meet during committee sessions and between sessions to develop specific rulemaking proposals for committee consideration.

(d) Further review. Negotiated rulemaking committees shall provide recommended rules to HUD. Once rules are proposed by HUD, they shall be published for comment in the Federal Register. Any comments will be further reviewed by the committee and HUD before HUD determines if the rule or rules will be adopted.

4. In § 1000.10(b), revise the definition of “Indian area” and add, in alphabetical order, the definitions for the terms “Housing related activities,” “Housing related community development,” “Outcomes,” and “Tribal program year,” to read as follows:

§ 1000.10 What definitions apply in these regulations?

* * * * *

(b) * * *

Housing related activities, for purposes of program income, means any facility, community building, infrastructure, business, program, or activity, including any community development or economic development activity, that:

(1) Is determined by the recipient to be beneficial to the provision of housing in an Indian area, and that:

(2) Would meet at least one of the following conditions:

(i) Would help an Indian tribe or its tribally designated housing entity to reduce the cost of construction of Indian housing;

(ii) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area; or

(iii) Would otherwise advance the purposes of NAHASDA.

* * * * *

Housing related community development:

(1) Means any facility, community building, business, activity, or infrastructure that:

(i) Is owned by an Indian tribe or a tribally designated housing entity;

(ii) Is necessary to the provision of housing in an Indian area; and

(iii)(A) Would help an Indian tribe or tribally designated housing entity reduce the cost of construction of Indian housing;

(B) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area; or

(C) Would otherwise advance the purposes of NAHASDA.

(2) Does not include any activity conducted by any Indian tribe under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)

* * * * *

Indian Area means the area within which an Indian tribe operates affordable housing programs or the area in which a TDHE, as authorized by one or more Indian tribes, operates affordable housing programs. Whenever the term “jurisdiction” is used in NAHASDA, it shall mean “Indian Area,” except where specific reference is made to the jurisdiction of a court.

* * * * *

Outcomes are the intended results or consequences important to program beneficiaries, the IHBG recipient, and the tribe generally from carrying out the housing or housing-related activity as determined by the tribe (and/or its TDHE).

* * * * *

Tribal program year means the fiscal year of the IHBG recipient.

* * * * *

5. In § 1000.12, revise paragraph (d), to read as follows:

§ 1000.12 What nondiscrimination requirements are applicable?

* * * * *

(d) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.) apply to Indian tribes that are not covered by the Indian Civil Rights Act. The Title VI and Title VIII requirements do not apply to actions under NAHASDA by federally recognized Indian tribes and their TDHEs. State-recognized Indian tribes and their TDHEs may provide preference for tribal members and other Indian families pursuant to NAHASDA sections 201(b) and 101(k) (relating to tribal preference in employment and contracting).

6. In § 1000.16, revise paragraphs (a)(1) and (c), redesignate paragraph (e) as paragraph (f), and add new paragraph (e), to read as follows:

§ 1000.16 What labor standards are applicable?

(a) * * *

(1) As described in section 104(b) of NAHASDA, contracts and agreements for assistance, sale, or lease under NAHASDA must require prevailing wage rates determined by the Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3141-44, 3146, and 3147) to be paid to laborers and mechanics employed in the development of affordable housing.

* * * * *

(c) Contract Work Hours and Safety Standards Act. Contracts in excess of \$100,000 to which Davis-Bacon or HUD-determined wage rates apply are subject by law to the overtime provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701).

* * * * *

(e) Paragraphs (a) through (d) of this section shall not apply to any contract or agreement for assistance, sale, or lease pursuant to NAHASDA, if such contract or agreement is otherwise

covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

* * * *

7. Add § 1000.21, to read as follows:

§ 1000.21 Under what circumstances are waivers of the environmental review procedures available to tribes?

A tribe or recipient may request that the Secretary waive the requirements under section 105 of NAHASDA. The Secretary may grant the waiver if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section:

- (a) Will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of that Act;
- (b) Does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
- (c) Is a result of inadvertent error, including an incorrect or incomplete certification provided under section 105(c)(1) of NAHASDA; and
- (d) May be corrected through the sole action of the recipient.

8. In § 1000.26, revise paragraphs (a)(5) and (a)(11) to read as follows:

§ 1000.26 What are the administrative requirements under NAHASDA?

(a) * * *

(5) Section 85.21, “Payment,” except that HUD shall not require a recipient to expend retained program income before drawing down or expending IHBG funds.

* * * * *

(11)(i) General. Section 85.36 of this title, “Procurement,” except paragraph (a), subject to paragraphs (a)(11)(ii) and (a)(11)(iii) of this section.

(ii) Bonding requirements. There may be circumstances under which the bonding requirements of § 85.36(h) are inconsistent with other responsibilities and obligations of the recipient. In such circumstances, acceptable methods to provide performance and payment assurance may include:

(A) Deposit with the recipient of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk;

(B) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk; or

(C) Letter of credit for 10 percent of the total contract price unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk, and compliance with the procedures for monitoring of disbursements by the contractor.

(iii) De minimis procurement. A recipient shall not be required to comply with § 85.36 of this title with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value of less than \$5,000.

(iv) Utilizing federal supply sources in procurement. In accordance with Section 101(j) of NAHASDA, recipients may use federal supply sources made available by the General Services Administration pursuant to 40 U.S.C. 501.

* * * * *

9. In § 1000.42, add paragraphs (c) and (d), to read as follows:

§ 1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?

* * * * *

(c) Tribal preference. Recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their tribe in accordance with section 101(k) of NAHASDA.

(d) Applicability. For purposes of section 3, NAHASDA funding is subject to the requirements applicable to the category of programs entitled “Other Programs” that provide housing and community development assistance (12 U.S.C. 1701u(c)(2), (d)(2)).

10. Revise § 1000.48, to read as follows:

§ 1000.48 Are Indian or tribal preference requirements applicable to IHBG activities?

Grants under this part are subject to Indian preference under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) or, if applicable under section 101(k) of NAHASDA, tribal preference in employment and contracting.

(a)(1) Section 7(b) provides that any contract, subcontract, grant, or subgrant pursuant to an act authorizing grants to Indian organizations or for the benefit of Indians shall require that, to the greatest extent feasible:

(i) Preference and opportunities for training and employment shall be given to Indians;
and

(ii) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452).

(2) The following definitions apply:

(i) The Indian Self-Determination and Education Assistance Act defines “Indian” to mean a person who is a member of an Indian tribe and defines “Indian tribe” to mean any Indian tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(ii) In section 3 of the Indian Financing Act of 1974, “economic enterprise” is defined as any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that Indian ownership must constitute not less than 51 percent of the enterprise. This act defines “Indian organization” to mean the governing body of any Indian tribe or entity established or recognized by such governing body.

(b) If tribal employment and contract preference laws have not been adopted by the Indian tribe, section 7(b) Indian preference provisions shall apply.

(c) Exception for de minimis procurements. A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than \$5,000.

11. Revise § 1000.50, to read as follows:

§ 1000.50 What tribal or Indian preference requirements apply to IHBG administration activities?

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference and opportunities for training and employment in connection with the administration of grants awarded under this part to Indians in accordance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

12. Revise § 1000.52, to read as follows:

§ 1000.52 What tribal or Indian preference requirements apply to IHBG procurement?

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises in accordance with Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

(c) The following provisions apply to the application of Indian preference under paragraph (b) of this section:

(1) In applying Indian preference, each recipient shall:

(i) Certify to HUD that the policies and procedures adopted by the recipient will provide preference in procurement activities consistent with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (An Indian preference policy which was previously approved by HUD for a recipient will meet the requirements of this section); or

(ii) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(iii) Use a two-stage preference procedure, as follows:

(A) Stage 1. Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement or request for proposals limited to Indian-owned firms.

(B) Stage 2. If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises.

(2) If the recipient selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid, or a proposal to perform the contract at a reasonable cost, then the recipient shall:

(i) Re-advertise the contract, using any of the methods described in paragraph (a) of this section; or

(ii) Re-advertise the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(iii) If one approvable bid or proposal is received, request Area ONAP review and approval of the proposed contract and related procurement documents, in accordance with 24 CFR 85.36, in order to award the contract to the single bidder or offeror.

(3) Procurements that are within the dollar limitations established for small purchases under 24 CFR 85.36 need not follow the formal bid or proposal procedures of paragraph (a) of this section, since these procurements are governed by the small purchase procedures of 24 CFR 85.36. However, a recipient's small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(4) All preferences shall be publicly announced in the advertisement and bidding or proposal solicitation documents and the bidding and proposal documents.

(5) A recipient, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Recipients may require prospective contractors to provide the following information before submitting a bid or proposal, or at the time of submission:

(i) Evidence showing fully the extent of Indian ownership and interest;

(ii) Evidence of structure, management, and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(iii) Evidence sufficient to demonstrate to the satisfaction of the recipient that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(6) The recipient shall incorporate the following clause (referred to as the section 7(b) clause) in each contract awarded in connection with a project funded under this part:

(i) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (the Indian Act). Section 7(b) requires that, to the greatest extent feasible:

(A) Preferences and opportunities for training and employment shall be given to Indians; and

(B) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(ii) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.

(iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.

(iv) The contractor shall include this section 7(b) clause in every subcontract in connection with the project; shall require subcontractors at each level to include this section 7(b) clause in every subcontract they execute in connection with the project; and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the section 7(b) clause of the Indian Act.

(d) A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than \$5,000.

13. In § 1000.58, revise paragraphs (f) and (g) to read as follows:

§ 1000.58 Are there limitations on the investment of IHBG funds?

* * * * *

(f) A recipient may invest its IHBG annual grant in an amount equal to the annual formula grant amount.

(g) Investments under this section may be for a period no longer than 5 years.

14. Revise § 1000.60, to read as follows:

§ 1000.60 Can HUD prevent improper expenditure of funds already disbursed to a recipient?

Yes. In accordance with the standards and remedies contained in §1000.532 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals, and hearing rights prescribed elsewhere in this part.

15. In § 1000.62, revise the heading and paragraph (b), to read as follows:

§ 1000.62 What is considered program income?

* * * * *

(b) If the amount of income received in a single year by a recipient and all its subrecipients, which would otherwise be considered program income, does not exceed \$25,000, such funds may be retained but will not be considered to be or treated as program income.

* * * * *

16. Add § 1000.64, to read as follows:

§ 1000.64 What are the permissible uses of program income?

Program income may be used for any housing or housing related activity and is not subject to other federal requirements.

17. In § 1000.104, revise paragraphs (b) and (c), and add paragraph (d), to read as follows:

§ 1000.104 What families are eligible for affordable housing activities?

* * * * *

(b) A non low-income family may receive housing assistance in accordance with § 1000.110.

(c) A family may receive housing assistance on a reservation or Indian area if the family's housing needs cannot be reasonably met without such assistance and the recipient determines that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families.

(d) A recipient may provide housing or housing assistance provided through affordable housing activities assisted with grant amounts under NAHASDA for a law enforcement officer on an Indian reservation or other Indian area, if:

(1) The officer:

(i) Is employed on a full-time basis by the federal government or a state, county, or other unit of local government, or lawfully recognized tribal government; and

(ii) In implementing such full-time employment, is sworn to uphold, and make arrests for, violations of federal, state, county, or tribal law; and

(2) The recipient determines that the presence of the law enforcement officer on the Indian reservation or other Indian area may deter crime.

18. Revise § 1000.106, to read as follows:

§ 1000.106 What families receiving assistance under title II of NAHASDA require HUD approval?

(a) Housing assistance for non low-income families requires HUD approval only as required in §§ 1000.108 and 1000.110.

(b) Assistance for essential families under section 201(b)(3) of NAHASDA does not require HUD approval but only requires that the recipient determine that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families and that the family's housing needs cannot be reasonably met without such assistance.

19. Revise § 1000.108, to read as follows:

§ 1000.108 How is HUD approval obtained by a recipient for housing for non low-income families and model activities?

Recipients are required to submit proposals to operate model housing activities as defined in section 202(6) of NAHASDA and to provide assistance to non low-income families in accordance with section 201(b)(2) of NAHASDA. Assistance to non low-income families must be in accordance with §1000.110. Proposals may be submitted in the recipient's IHP or at any time by amendment of the IHP, or by special request to HUD at any time. HUD may approve the

remainder of an IHP, notwithstanding disapproval of a model activity or assistance to non low-income families.

20. Revise §1000.110, to read as follows:

§ 1000.110 Under what conditions may non low-income Indian families participate in the program?

(a) A family that was low-income at the times described in § 1000.147 but subsequently becomes a non low-income family due to an increase in income may continue to participate in the program in accordance with the recipient's admission and occupancy policies. The 10 percent limitation in paragraph (c) of this section shall not apply to such families. Such families may be made subject to the additional requirements in paragraph (d) of this section based on those policies. This includes a family member or household member who takes ownership of a homeownership unit under § 1000.146.

(b) A recipient must determine and document that there is a need for housing for each family that cannot reasonably be met without such assistance.

(c) A recipient may use up to 10 percent of the amount planned for the tribal program year for families whose income falls within 80 to 100 percent of the median income without HUD approval. HUD approval is required if a recipient plans to use more than 10 percent of the amount planned for the tribal program year for such assistance or to provide housing for families with income over 100 percent of median income.

(d) Non low-income families cannot receive the same benefits provided low-income Indian families. The amount of assistance non low-income families may receive will be determined as follows:

(1) The rent (including homebuyer payments under a lease purchase agreement) to be paid by a non low-income family cannot be less than: $(\text{Income of non low-income family} / \text{Income of family at 80 percent of median income}) \times (\text{Rental payment of family at 80 percent of median income})$, but need not exceed the fair market rent or value of the unit.

(2) Other assistance, including down payment assistance, to non low-income families, cannot exceed: $(\text{Income of family at 80 percent of median income} / \text{Income of non low-income family}) \times (\text{Present value of the assistance provided to family at 80 percent of median income})$.

(e) The requirements set forth in paragraphs (c) and (d) of this section do not apply to non low-income families which the recipient has determined to be essential under § 1000.106(b).

21. Revise § 1000.114, to read as follows:

§ 1000.114 How long does HUD have to review and act on a proposal to provide assistance to non low-income families or a model housing activity?

Whether submitted in the IHP or at any other time, HUD will have 60 calendar days after receiving the proposal to notify the recipient in writing that the proposal to provide assistance to non low-income families or for model activities is approved or disapproved. If no decision is made by HUD within 60 calendar days of receiving the proposal, the proposal is deemed to have been approved by HUD.

22. Revise § 1000.116, to read as follows:

§ 1000.116 What should HUD do before declining a proposal to provide assistance to non low-income families or a model housing activity?

HUD shall consult with a recipient regarding the recipient's proposal to provide assistance to non low-income families or a model housing activity. To the extent that resources are available, HUD shall provide technical assistance to the recipient in amending and modifying the proposal, if necessary. In case of a denial, HUD shall give the specific reasons for the denial.

23. In § 1000.118, revise the heading and paragraph (a), to read as follows:

§ 1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income families or a model housing activity?

(a) Within 30 calendar days of receiving HUD's denial of a proposal to provide assistance to non low-income families or a model housing activity, the recipient may request reconsideration of the denial in writing. The request shall set forth justification for the reconsideration.

* * * * *

24. Add § 1000.141, to read as follows:

§ 1000.141 What is “useful life” and how is it related to affordability?

Useful life is the time period during which an assisted property must remain affordable, as defined in section 205(a) of NAHASDA.

25. Revise § 1000.142, to read as follows:

§ 1000.142 How does a recipient determine the “useful life” during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?

To the extent required in the IHP, each recipient shall describe its determination of the useful life of the assisted housing units in its developments in accordance with the local conditions of the Indian area of the recipient. By approving the plan, HUD determines the useful life in accordance with section 205(a)(2) of NAHASDA and for purposes of section 209.

26. Add § 1000.143, to read as follows:

§ 1000.143 How does a recipient implement its useful life requirements?

A recipient implements its useful life requirements by placing a binding commitment, satisfactory to HUD, on the assisted property.

27. Redesignate § 1000.144 and § 1000.146 as § 1000.145 and § 1000.147, respectively.

28. Add § 1000.144, to read as follows:

§ 1000.144 What are binding commitments satisfactory to HUD?

A binding commitment satisfactory to HUD is a written use restriction agreement, developed by the recipient, and placed on an assisted property for the period of its useful life.

29. Add § 1000.146, to read as follows:

§ 1000.146 Are binding commitments for the remaining useful life of property applicable to a family member or household member who subsequently takes ownership of a homeownership unit?

No. The transfer of a homeownership unit to a family member or household member is not subject to a binding commitment for the remaining useful life of the property. Any

subsequent transfer by the family member or household member to a third party (not a family member or household member) is subject to any remaining useful life under a binding commitment.

30. Revise redesignated § 1000.147, to read as follows:

§ 1000.147 When does housing qualify as affordable housing under NAHASDA?

(a) Housing qualifies as affordable housing, provided that the family occupying the unit is low-income at the following times:

(1) In the case of rental housing, at the time of the family's initial occupancy of such unit;

(2) In the case of a contract to purchase existing housing, at the time of purchase;

(3) In the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the agreement is signed; and

(4) In the case of a contract to purchase housing to be constructed, at the time the contract is signed.

(b) Families that are not low-income as described in this section may be eligible under §1000.104 or §1000.110.

31. In § 1000.150, revise the heading to read as follows:

§ 1000.150 How may Indian tribes and TDHEs receive criminal conviction information on applicants for employment and on adult applicants for housing assistance, or tenants?

32. Revise § 1000.152 to read as follows:

§ 1000.152 How is the recipient to use criminal conviction information?

(a) With regard to adult tenants and applicants for housing assistance, the recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening, lease enforcement, and eviction actions.

(b) With regard to applicants for employment, the recipient shall use the criminal conviction information described in § 1000.150 for the purposes set out in section 208 of NAHASDA.

(c) The criminal conviction information described in § 1000.150 may be disclosed only to any person who has a job-related need for the information and who is an authorized officer, employee, or representative of the recipient or the owner of housing assisted under NAHASDA.

33. Revise § 1000.201, to read as follows:

§ 1000.201 How are funds made available under NAHASDA?

Every fiscal year HUD will make grants under the IHBG program to recipients who have submitted to HUD for a tribal program year an IHP in accordance with § 1000.220 to carry out affordable housing activities.

34. Revise § 1000.214, to read as follows:

§ 1000.214 What is the deadline for submission of an IHP?

IHPs must be initially sent by the recipient to the Area ONAP no later than 75 days before the beginning of a tribal program year. Grant funds cannot be provided until the plan due under this section is determined to be in compliance with section 102 of NAHASDA and funds are available.

35. Revise § 1000.216, to read as follows:

§ 1000.216 What happens if the recipient does not submit the IHP to the Area ONAP by not later than 75 days before the beginning of the tribal program year?

If the IHP is not initially sent by at least 75 days before the beginning of the tribal program year, the recipient will not be eligible for IHBG funds for that fiscal year. Any funds not obligated because an IHP was not received before this deadline has passed shall be distributed by formula in the following year.

36. Revise § 1000.220, to read as follows:

§ 1000.220 What are the requirements for the IHP?

The IHP requirements are set forth in section 102(b) of NAHASDA. In addition, §§ 1000.56, 1000.108, 1000.120, 1000.134, 1000.142, 1000.238, 1000.302, and 1000.328, require or permit additional items to be set forth in the IHP for HUD determinations required by those sections. Recipients are only required to provide IHPs that contain these elements in a form prescribed by HUD. If a TDHE is submitting a single IHP that covers two or more Indian tribes, the IHP must contain a separate certification in accordance with section 102(d) of NAHASDA and IHP Tables for each Indian tribe when requested by such Indian tribes. However, Indian tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven.

37. Revise § 1000.224, to read as follows:

§ 1000.224 Can any part of the IHP be waived?

Yes. HUD has general authority under section 101(b)(2) of NAHASDA to waive any IHP requirements when an Indian tribe cannot comply with IHP requirements due to exigent circumstances beyond its control, for a period of not more than 90 days. The waiver authority under section 101(b)(2) of NAHASDA provides flexibility to address the needs of every Indian tribe, including small Indian tribes. The waiver may be requested by the Indian tribe or its TDHE (if such authority is delegated by the Indian tribe), and such waiver shall not be unreasonably withheld.

38. Add § 1000.225, to read as follows:

§ 1000.225 When may a waiver of the IHP submission deadline be requested?

A recipient may request a waiver for a period of not more than 90 days beyond the IHP submission due date.

39. Add § 1000.227, to read as follows:

§ 1000.227 What shall HUD do upon receipt of a IHP submission deadline waiver request?

The waiver shall be decided upon by HUD within 45 days of receipt of the waiver request. HUD shall notify the recipient in writing within 45 days of receipt of the waiver request whether the request is approved or denied.

40. In § 1000.230, revise paragraph (a)(1), to read as follows:

§ 1000.230 What is the process for HUD review of IHPs and IHP amendments?

* * * *

(a) * * *

(1) Comply with the requirements of section 102 of NAHASDA, which outlines the IHP submission requirements; however, the recipient may use either the HUD-estimated IHBG amount or the IHBG amount from their most recent compliant IHP;

* * * * *

41. In § 1000.236, revise paragraphs (a)(4), (a)(5), and (b), and add paragraph (a)(6), to read as follows:

§ 1000.236 What are eligible administrative and planning expenses?

(a) * * *

(4) Preparation of the annual performance report;

(5) Challenge to and collection of data for purposes of challenging the formula; and

(6) Administrative and planning expenses associated with expenditure of non-IHBG funds on affordable housing activities if the source of the non-IHBG funds limits expenditure of its funds on such administrative expenses.

(b) Staff and overhead costs directly related to carrying out affordable housing activities or comprehensive and community development planning activities can be determined to be eligible costs of the affordable housing activity or considered administration or planning at the discretion of the recipient.

42. Revise § 1000.238, to read as follows:

§ 1000.238 What percentage of the IHBG funds can be used for administrative and planning expenses?

Recipients receiving in excess of \$500,000 may use up to 20 percent of their annual expenditures of grant funds or may use up to 20 percent of their annual grant amount, whichever

is greater. Recipients receiving \$500,000 or less may use up to 30 percent of their annual expenditures of grant funds or up to 30 percent of their annual grant amount, whichever is greater. When a recipient is receiving grant funds on behalf of one or more grant beneficiaries, the recipient may use up to 30 percent of the annual expenditure of grant funds or up to 30 percent of their annual grant amount, whichever is greater, of each grant beneficiary whose allocation is \$500,000 or less, and up to 20 percent of the annual expenditure of grant funds or up to 20 percent of their annual grant amount, whichever is greater, of each grant beneficiary whose allocation is greater than \$500,000. HUD approval is required if a higher percentage is requested by the recipient. Recipients combining grant funds with other funding may request HUD approval to use a higher percentage based on its total expenditure of funds from all sources for that year. When HUD approval is required, HUD must take into consideration any cost of preparing the IHP, challenges to and collection of data, the recipient's grant amount, approved cost allocation plans, and any other relevant information with special consideration given to the circumstances of recipients receiving minimal funding.

43. Add § 1000.239, to read as follows:

§ 1000.239 May a recipient establish and maintain reserve accounts for administration and planning?

Yes. In addition to the amounts established for planning and administrative expenses under §§ 1000.236 and 1000.238, a recipient may establish and maintain separate reserve accounts only for the purpose of accumulating amounts for administration and planning relating to affordable housing activities. These amounts may be invested in accordance with § 1000.58(c). Interest earned on reserves is not program income and shall not be included in

calculating the maximum amount of reserves. The maximum amount of reserves, whether in one or more accounts, that a recipient may have available at any one time is calculated as follows:

- (a) Determine the 5-year average of administration and planning amounts, not including reserve amounts, expended in a tribal program year.
- (b) Establish $\frac{1}{4}$ of that amount for the total eligible reserve.

44. Add § 1000.244, to read as follows:

§1000.244 If the recipient has made a good-faith effort to negotiate a cooperation agreement and tax-exempt status but has been unsuccessful through no fault of its own, may the Secretary waive the requirement for a cooperation agreement and a tax exemption?

Yes. Recipients must submit a written request for waiver to the recipient's Area ONAP. The request must detail a good-faith effort by the recipient, identify the housing units involved, and include all pertinent background information about the housing units. The recipient must further demonstrate that it has pursued and exhausted all reasonable channels available to it to reach an agreement to obtain tax-exempt status, and that failure to obtain the required agreement and tax-exempt status has been through no fault of its own. The Area ONAP will forward the request, its recommendation, comments, and any additional relevant documentation to the Deputy Assistant Secretary for Native American Programs for processing to the Assistant Secretary.

45. Add § 1000.246, to read as follows:

§1000.246 How must HUD respond to a request for waiver of the requirement for a cooperation agreement and a tax exemption?

(a) HUD shall make a determination to such request for a waiver within 30 days of receipt or provide a reason to the requestor for the delay, identify all additional documentation necessary, and provide a timeline within which a determination will be made.

(b) If the waiver is granted, HUD shall notify the recipient of the waiver in writing and inform the recipient of any special condition or deadlines with which it must comply. Such waiver shall remain effective until revoked by the Secretary.

(c) If the waiver is denied, HUD shall notify the recipient of the denial and the reason for denial in writing. If the request is denied, IHBG funds may not be spent on the housing units. If IHBG funds have been spent on the housing units prior to the denial, the recipient must reimburse the grant for all IHBG funds expended.

46. In § 1000.302, revise paragraph (2)(i)(B) of the definition of “Formula area” and paragraph (3) of the definition of “Substantial housing services,” to read as follows:

§ 1000.302 What are the definitions applicable for the IHBG formula?

* * * *

Formula area. * * *

(2)(i) * * *

(B) Is providing substantial housing services and will continue to expend or obligate funds for substantial housing services, as reflected in its Indian Housing Plan and Annual Performance Report for this purpose.

* * * *

Substantial housing services are:

* * *

(3) HUD shall require that the Indian tribe annually provide written verification, in its Indian Housing Plan and Annual Performance Report, that the affordable housing activities it is providing meet the definition of substantial housing services.

* * * * *

47. In § 1000.328, revise paragraph (b)(2), to read as follows:

§ 1000.328 What is the minimum amount that an Indian tribe may receive under the need component of the formula?

* * * * *

(b) * * *

(2) Certify in its Indian Housing Plan the presence of any households at or below 80 percent of median income.

48. Revise § 1000.332, to read as follows:

§ 1000.332 Will data used by HUD to determine an Indian tribe's or TDHE's formula allocation be provided to the Indian tribe or TDHE before the allocation?

Yes. HUD shall provide notice to the Indian tribe or TDHE of the data to be used for the formula and projected allocation amount by June 1.

49. Remove § 1000.408.

50. In § 1000.410, revise paragraphs (c) and (d), and add paragraph (e) to read as follows:

§ 1000.410 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

* * * * *

(c) The repayment period may exceed 20 years, and the length of the repayment period cannot be the sole basis for HUD disapproval;

(d) Lender and issuer/borrower must certify that they acknowledge and agree to comply with all applicable tribal laws; and

(e) A guarantee made under Title VI of NAHASDA shall guarantee repayment of 95 percent of the unpaid principal and interest due on the notes or other obligations guaranteed.

51. In § 1000.424, revise paragraph (a), remove paragraph (d)(2), and redesignate paragraphs (d)(3) and (d)(4) as paragraphs (d)(2) and (d)(3), respectively, to read as follows:

§ 1000.424 What are the application requirements for guarantee assistance under title VI of NAHASDA?

* * * * *

(a) An identification of each of the activities to be carried out with the guaranteed funds and a description of how each activity qualifies:

(1) As an affordable housing activity as defined in section 202 of NAHASDA; or

(2) As a housing related community development activity under section 601(a) of NAHASDA.

* * * * *

52. In § 1000.428, revise paragraphs (b) and (e) to read as follows:

§ 1000.428 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

* * * * *

(b) The loan or other obligation for which the guarantee is requested exceeds any of the limitations specified in sections 601(c) or section 605(d) of NAHASDA.

* * * * *

(e) The activities to be undertaken are not eligible under either:

(1) Section 202 of NAHASDA; or

(2) Section 601(a) of NAHASDA.

* * * * *

53. Add § 1000.503, to read as follows:

§ 1000.503 What is an appropriate extent of HUD monitoring?

(a) Subject to any conflicting or supplementary requirement of specific legislation, and upon the effective date of this regulation, the frequency of HUD monitoring of a particular recipient will be determined by application of the HUD standard risk assessment factors, provided that when a recipient requests to be monitored, HUD shall conduct such monitoring as soon as practicable. The HUD standard risk assessment factors may be but are not limited to the following:

(1) Annual grant amount;

(2) Disbursed amounts – all open grants;

(3) Months since last on-site monitoring;

(4) Delinquent audits;

- (5) Open audit findings;
- (6) Conclusions of auditor;
- (7) Open monitoring findings;
- (8) Delinquent Annual Performance Reports or Annual Status and Evaluation Reports;
- (9) Status of Corrective Action Plan (CAP) or Performance Agreement (PA);
- (10) Recipient Self-Monitoring;
- (11) Inspection of 1937 Act units;
- (12) Preservation of 1937 Act units; and
- (13) Any other additional factors that may be determined by HUD, consistent with HUD's Tribal Consultation Policy, by which HUD will send written notification and provide a comment period. Such additional factors shall be provided by program guidance.

(b) Provided that if monitoring indicates noncompliance, HUD may undertake additional sampling and review to determine the extent of such noncompliance, the level of HUD monitoring of a recipient once that recipient has been selected for HUD monitoring is as follows:

- (1) Review recipient program compliance for the current program year and the 2 prior program years;
- (2) On-site inspection of no more than 10 dwelling units or 10 percent of total dwelling units, whichever is greater;
- (3) Review of no more than 10 client files or 10 percent of client files, whichever is greater.

(c) Notwithstanding paragraph (b) of this section, HUD may at any time undertake additional sampling and review of prior program years, subject to the records retention

limitations of § 1000.552, if HUD has credible information suggesting noncompliance. HUD will share this information with the recipient as appropriate.

(d) A recipient may request ONAP to enter into self-monitoring mutual agreements or other self-monitoring arrangements with recipients. ONAP will monitor the recipient only in accordance with such agreement or arrangement, unless ONAP finds reasonable evidence of fraud, a pattern of noncompliance, or the significant unlawful expenditure of IHBG funds.

54. Remove § 1000.504.

55. In § 1000.512, revise paragraphs (b) and (c), and add paragraphs (d) and (e), to read as follows:

§ 1000.512 Are performance reports required?

* * * * *

(b) Brief information on the following:

(1) A comparison of actual accomplishments to the planned activities established for the period;

(2) The reasons for slippage if established planned activities were not met; and

(3) Analysis and explanation of cost overruns or high unit costs;

(c) Any information regarding the recipient's performance in accordance with HUD's performance measures, as set forth in section §1000.524; and

(d) Annual performance data to reflect the accomplishments of the recipient to include, as specified in the IHP:

(1) Permanent and temporary jobs supported with IHBG funds;

- (2) Outputs by eligible activity, including:
 - (i) Units completed or assisted, and
 - (ii) Families assisted; and
- (3) Outcomes by eligible activity.
- (e) As applicable, items required under §§ 1000.302 and 1000.544.

56. In § 1000.520, revise the heading, introductory text, and paragraph (c), to read as follows:

§ 1000.520 What are the purposes of HUD’s review of the Annual Performance Report?

HUD will review each recipient's Annual Performance Report when submitted to determine whether the recipient:

* * * * *

- (c) Whether the Annual Performance Report of the recipient is accurate.

57. In § 1000.524, remove paragraph (a), redesignate paragraphs (b) through (f) as paragraphs (a) through (e), and revise redesignated paragraph (d), to read as follows:

§ 1000.524 What are HUD’s performance measures for the review?

* * * * *

- (d) The recipient has met the IHP- planned activities in the one-year plan.

* * * * *

58. Revise § 1000.528, to read as follows:

§ 1000.528 What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

HUD will issue a draft report to the recipient and Indian tribe within 60 days of the completion of HUD's review. The recipient will have at least 60 days to review and comment on the draft report, as well as provide any additional information relating to the draft report. Upon written notification to HUD, the recipient may exercise the right to take an additional 30 days to complete its review and comment to the draft report. Additional extensions of time for the recipient to complete review and comment may be mutually agreed upon in writing by HUD and the recipient. HUD shall consider the comments and any additional information provided by the recipient. HUD may also revise the draft report based on the comments and any additional information provided by the recipient. HUD shall make the recipient's comments and a final report readily available to the recipient, grant beneficiary, and the public not later than 30 days after receipt of the recipient's comments and additional information.

59. In § 1000.530, revise the heading and paragraph (b), to read as follows:

§ 1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §1000.532?

* * * * *

(b) Failure of a recipient to address performance problems specified in paragraph (a) of this section may result in the imposition of sanctions as prescribed in §1000.532.

60. Revise § 1000.532, to read as follows:

§ 1000.532 What are the remedial actions that HUD may take in the event of recipient's substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA or these regulations, HUD shall carry out any of the following actions with respect to the recipient's current or future grants, as appropriate:

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA or these regulations;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in §1000.542, provide a replacement TDHE for the recipient.

(b) Before undertaking any action in accordance with paragraph (a) of this section, HUD will notify the recipient in writing of the action it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. Before taking any action under paragraph (a) of this section, HUD shall provide the recipient with the opportunity for a hearing no less than 30 days prior to taking the proposed action. The hearing shall be held in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been conducted and HUD has rendered a final decision.

(c) Notwithstanding paragraphs (a) and (b) of this section, if HUD makes a determination that the failure of a recipient to comply substantially with any material provision of NAHASDA or these regulations is resulting, and would continue to result, in a continuing

expenditure of funds provided under NAHASDA in a manner that is not authorized by law, HUD may, in accordance with section 401(a)(4) of NAHASDA, take action under paragraph (a)(3) of this section prior to conducting a hearing under paragraph (b) of this section. HUD shall provide notice to the recipient at the time that HUD takes that action and conducts a hearing, in accordance with section 401(a)(4)(B) of NAHASDA, within 60 days of such notice.

(d) Notwithstanding paragraph (a) of this section, if HUD determines that the failure to comply substantially with the provisions of NAHASDA or these regulations is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, if the recipient requests HUD shall provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA. A recipient's eligibility for technical assistance under this subsection is contingent on the recipient's execution of, and compliance with, a performance agreement pursuant to Section 401(b) of NAHASDA.

(e) In lieu of, or in addition to, any action described in this section, if the Secretary has reason to believe that the recipient has failed to comply substantially with any provisions of NAHASDA or these regulations, HUD may refer the matter to the Attorney General of the United States, with a recommendation that appropriate civil action be instituted.

61. In § 1000.534, revise paragraph (a) to read as follows:

§ 1000.534 What constitutes substantial noncompliance?

* * * * *

(a) The noncompliance has a material effect on the recipient meeting its planned activities as described in its Indian Housing Plan;

* * * * *

62. In § 1000.536, revise the heading to read as follows:

§ 1000.536 What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under §1000.532?

* * * * *

63. Remove § 1000.538.

64. Revise § 1000.544 to read as follows:

§ 1000.544 What audits are required?

Pursuant to NAHASDA Section 405(a), the recipient must comply with the requirements of the Single Audit Act (chapter 75 of title 31, United States Code), including OMB Circular A-133, which require annual audits of recipients that expend federal funds equal to or in excess of an amount specified by the Office of Management and Budget (OMB), as set out in OMB Circular A-133, subpart B, section 200. If applicable, a certification that the recipient has not expended federal funds in excess of the audit threshold that is set by OMB shall be included in the recipient's Annual Performance Report.

65. Revise § 1000.548, as follows:

§ 1000.548 Must a copy of the recipient's audit pursuant to the Single Audit Act relating to NAHASDA activities be submitted to HUD?

Yes. A copy of the latest recipient audit under the Single Audit Act relating to NAHASDA activities must be submitted to the appropriate HUD ONAP area office at the same time it is submitted to the Federal Audit Clearinghouse pursuant to OMB Circular A-133.

66. Revise § 1000.552 paragraph (b), to read as follows:

§ 1000.552 How long must the recipient maintain program records?

* * * * *

(b) Except as otherwise provided herein, records must be retained for 3 years from the end of the tribal program year during which the funds were expended.

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Date: October 4, 2011

Sandra B. Henriquez
Assistant Secretary for
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